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MAY 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1579

CHARLES A. MIELE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

CHARLES A. MIELE,

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against

UNITED STATES OF AMERICA,

Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Charles A. Miele, prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the Fifth Circuit, entered in the office of the clerk of that court on April 26, 1973.

Opinions Below

The United States District Court for the Southern District of Florida entered a judgment of conviction on October 26, 1972 after trial before the Hon. Joe Eaton, United States District Judge and a jury. It is reproduced as Appendix I, *infra.*

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on April 26, 1973. Its judgment is reproduced as Appendix II, *infra*.

There were no opinions in either the United States District Court or in the Court of Appeals.

Jurisdiction

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 26, 1973, affirming petitioner's conviction for violations of 18 U.S.C. §§2, 371, 1341 and 1342 entered October 26, 1972 in the United States District Court for the Southern District of Florida.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the plea bargaining tactics of the prosecutor violated the petitioner's rights under the Due Process Clause of the Fifth Amendment so as to deny him a fair trial?

2. Whether the prosecutor's use at trial of incriminating statements attributable to the petitioner deprived the petitioner of his right to counsel under the Sixth Amendment as put forth in this Court's holding in *Massiah* v. *United States*, 377 U.S. 201 (1963)?

Constitutional, Statutory and Other Provisions Involved

1. United States Constitution, Fifth Amendment

No person shall * * * be deprived of life, liberty, or property, without due process of law;

2. United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

3. Title 18, United States Code §2

Principals

(a) whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal * * *

4. Title 18, United States Code §371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *

5. Title 18, United States Code §1341

Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

6. Title 18, United States Code §1342

Fictitious Name or Address

Whoever, for the purpose of conducting, promoting or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his

own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Statement of the Case

The petitioner, Charles A. Miele, seeks a writ of certiorari to review his judgment of conviction for violations of 18 U.S.C. §1341 (mail fraud), §1342 (mail fraud), §371 (conspiracy) and §2 (aiding and abetting).

The petitioner, along with a co-defendant, John Schwindler, was tried in the United States District Court for the Southern District of Florida before the Hon. Joe Eaton, United States District Judge, and a jury.

Trial commenced on August 23, 1972. On September 23 the jury found Miele guilty as to all counts.

On October 26, 1972 the petitioner was sentenced to a total sentence of confinement of six (6) years.

There were two indictments in this case. One was handed down in January 1972 and the second superseding indictment on which the case went to trial was returned on April 28, 1972. Both indictments alleged the same acts of conspiracy and fraud and involve a rather complex scheme to defraud persons through the use of mortgage commitments.

For the sake of simplicity, the nature of the case is essentially this:

The petitioner, Charles Miele, and others were alleged to have transformed a shell corporation known as Transcontinental Casualty Insurance Company, Ltd. into an advance fee mortgage commitment operation which was fraudulent in nature and designed to collect advance fee payments in return for false and fraudulent promises of valuable mortgage commitments which were given in return for the advance fee payment.

Others named in the indictment were persons who acted as brokers through various trade styles including International Union Services for Transcontinental. In addition it was alleged that the petitioner caused fraudulent financial statements for Transcontinental to be prepared and merged forces with the operators of the Bank of Sark so as to have the bank furnish false and fraudulent verification of Transcontinental's assets and operations.

As stated there were two indictments. The first indictment was returned on January 24, 1972. Besides naming Miele as a defendant, others were named as co-defendants including Edwin Fox, Jay Long, Edward Killackey, Ronald Gibson, Phillip Wilson and Michael Strauss. As a result of plea bargaining, these defendants pled guilty and were named as unindicted co-conspirators in the superseding indictment of April 28, 1972. Frank Blosser, a principal of Transcontinental was named as a co-defendant in the second indictment but he too pled guilty prior to trial.

This petition is concerned with the plea bargaining tactics of the prosecution with regard to those accomplices

who pled guilty under either indictment and testified against the petitioner. It is the plea bargaining that resulted in the denial of petitioner's fundamental and due process right to a fair trial under the Fifth Amendment.

Also involved in this petition is the prosecution's use of incriminating statements, alleged to have been made by the petitioner, without benefit or knowledge of counsel in violation of his Sixth Amendment rights.

REASONS FOR GRANTING THE WRIT

I

The plea bargaining tactics of the prosecution violated the petitioner's rights under the Due Process Clause of the Fifth Amendment so as to deny him a fair trial.

There is no doubt that the plea bargaining process has become an important practice in the administration of justice. As Chief Justice Burger stated in the case of *Santobello* v. *New York*, 404 U.S. 254 (1971):

> * * * The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered it is to be encouraged. * * * *Id.* at 260-61.

Yet the most ardent proponent of the plea bargaining process could not condone the plea bargaining which occurred in this case nor find that it was properly administered.

For this is not a case where a defendant challenges the validity of his own plea made pursuant to an agreement. Rather, this petition presents a challenge to the mass plea bargaining that took place between the prosecution and the petitioner's co-conspirators, the breadth of which virtually guaranteed a prosecution-stacked deck against one man. It is a case where the prosecution and the co-conspirators shared a bed of iniquity, the end product of which was to deny the petitioner his fundamental right to a fair trial.

There is case law, and the petitioner makes no argument, that accomplices who have pled guilty with the hope of a reduced sentence may testify against a remaining defendant even before they are sentenced, so long as the jury is so apprised and the opportunity for cross-examination exists. See, *e.g.*, *United States* v. *Insana*, 423 F.2d 1165 (2d Cir. 1970); *DeRosier* v. *United States*, 407 F.2d 959 (8th Cir. 1969); *United States* v. *Vida*, 370 F.2d 759 (6th Cir. 1966); *United States* v. *Rainone*, 192 F.2d 860 (2d Cir. 1951).

Here the situation is not nearly so neat. Here is a situation where the petitioner's co-conspirators were threatened, wooed and courted by two Assistant United States Attorneys into pleading guilty and testifying against the petitioner. The plea bargains on their face create an aura of illegitimacy that is only buttressed by the background details of the arrangements. What begins as a legitimate and vital component of judicial administration becomes a cloud of fundamental unfairness to one who chooses to stand trial on the issue of his guilt.

This petition centers around those co-conspirators who pled guilty under either indictment and testified against the petitioner pursuant to their plea bargains with two Assistant United States Attorneys, Richard Kirschner and Arthur Tifford.

The "Plea Bargaining" Agreements

(1) **Frank Blosser:** A principal of Transcontinental; at the time of this case he was serving a five-year sentence for mail fraud in relation to Home Industrial Bank, a small industrial loan company in Colorado (A. 213).*

He was subsequently indicted in this case and was named in five indictments in Kansas City and one in North Carolina (A. 214).

When he was indicted, Kirschner and Tifford offered him a sentence of a minimum of 6 years and a maximum of 9 years, said sentence to run consecutively with the sentence he was then serving (A. 215).

He pled guilty on August 15, 1972, but instead of his original minimum of 6 years and maximum of 9 years, he worked a new deal with the government in exchange for his testimony. This new deal provided that three of the Kansas City cases would be transferred to Miami under Rule 20; the two others would be dismissed as would be the North Carolina indictment (A. 216-18).

In addition the government was to recommend a 6-year sentence on all the guilty pleas to run concurrently with the 5-year sentence he was then serving (A. 218-19).

* References so designated are to the Joint Appendix in the Fifth Circuit.

The government was also to recommend incarceration in a minimum security institution (A. 219-20) and there would be no criminal prosecution on income tax evasion (A. 222).

(2) **Jack Agnew**: He would solicit individuals who were interested in obtaining loan commitments and acted as an escrow attorney for International Union Services who would then refer the mortgage commitments to Transcontinental.

He was indicted in this case in January 1972. Prior to this he was indicted in Kansas on a related scheme and subsequent to this case he was indicted in Chicago (A. 227-28).

He first met Tifford and Kirschner in March, 1972 (A. 228). On April 5 he pleaded guilty and the agreement was for a 6-year sentence under 18 U.S.C. §4208(a)(2) (eligible for immediate parole) and that the Chicago and Kansas City indictments would be transferred to Miami for disposition (A. 234-35).

Once again on the eve of trial the agreement was changed. Now the government was to recommend a sentence of not more than 2 years, also under §4208(a)(2). The sentence for all three cases would run concurrently. In addition, the government agreed to forego any prosecution for income tax evasion (A. 235-37); he didn't have to disclosed to *any* government agency where his assets were (A. 237); government would recommend a maximum period of 10 months' incarceration at a minimum security institu-

tion (A. 237-38) and that none of the information furnished by him would be turned over to any state authority (A. 238).

(3) **Edward Killackey**: He, along with Jack Agnew, worked out of International Union Service which acted as broker for Transcontinental. His prime function was to act as liaison with brokers throughout the country.

He was indicted under the January indictment and named as a co-conspirator in the second indictment (A. 150). He pled guilty along with Agnew on April 5, 1972. His original agreement was for a 5-year sentence with recommendation of parole after 3 years. All further indictments were to be Rule 20'd to Miami. A minimum security institution and a §4208(a)(2) sentence were to be recommended (A. 150-1).

Once again on the eve of trial a new agreement was entered into. Tifford and Kirschner made him a deal whereby the sentence for all cases would be 15 months with a recommendation after 5 months (A. 153-54).

They told him that the Board of Parole always followed their recommendations; that they had the keys to the jail (A. 155).

(4) **Phillip Wilson**: He operated the Bank of Sark which falsely represented that Transcontinental had an excess of nine million dollars on deposit in the Bank of Sark and recommended Transcontinental to banking institutions that made inquiry as to Transcontinental.

Wilson pled guilty on March 31, 1972 after a week of negotiating a deal with Tifford and Kirschner (A. 127-28).

He agreed to a 9-year sentence under §4208(a)(2). Parole was to be recommended no later than 3 years. If Fox and Long were recommended for parole at a time earlier than 3 years, Tifford and Kirschner would likewise recommend him for parole at that time (A. 133-35).

Subsequently, Fox and Long entered into a new deal so that at the time they testified they expected to be paroled after 14 months (A. 135).

Wilson's background belies his lenient arrangement. At the time of this case he had been indicted in St. Louis; indicted in California for perjury before the grand jury in this case; and indicted in New York for stock manipulation, obstruction of justice and extortion. He was advised that the government knew of other fraudulent deals involving the Bank of Sark (A. 137).

Yet under his "plea bargain" he would not receive any additional sentence for activities prior to March 31, 1972 which covered all those pending indictments as they would be Rule 20'd to Miami and the sentences would run concurrently (A. 138-40, 142-43).

He also had a "me-too" clause in his agreement. When any one of the people who pled guilty or who were convicted received a recommendation for parole he would also receive a like recommendation (A. 144-45).

(5) **Ronald Gibson**: He was another broker for mortgage commitments that were forwarded to Transcontinental.

Gibson pled guilty to perjury in California in connection with his grand jury appearance in this case and received a sentence of 4 years' probation. The U. S. attorney was none other than Richard Kirschner (A. 192).

He also entered a guilty plea under the first indictment in Los Angeles (A. 193).

He was 32 years old and already convicted of three felonies by the time this case came to trial (A. 200, 205). The perjury conviction and plea in this case of course constituted violation of probation (A. 208).

Gibson maintained that no deal was made in this case (A. 197-98). Yet he was threatened with other indictments but since he cooperated no indictments had come down and he didn't expect any (A. 194-96). Today, after testifying for the prosecution, he freely walks the streets of Los Angeles.

(6) **Edwin Fox:** Along with Jay Long he operated International Union Services and solicited mortgage commitments for Transcontinental. Later he and Long bought into Transcontinental.

Named in the first indictment as a co-defendant, he turned himself in, along with Long, to Tifford in January 1972 (A. 66-69). In January he pled guilty along with Long after being threatened by Tifford with indictments all over the country (A. 75).

Originally he agreed to a 9-year sentence under 18 U.S.C. §4208(a)(2) with a guarantee of a recommendation

for parole after 3 years. However, if any one of six named co-defendants became eligible for parole at an earlier time, the government would likewise recommend parole for him. In addition he and Long were granted immunity from any criminal prosecutions arising out of the subject matter of their testimony except a pending indictment in Wichita arising out of the Anglo-Canadian fraud. This indictment was to be Rule 20'd and the same sentence recommended to run concurrently. The government also agreed to recommend to all state prosecuting agencies that he and Long were not to be prosecuted on any matters arising from the information supplied to the government in this case. Also, he and Long were to be recommended for incarceration together at a minimum security institution and were not to be the subject of criminal tax prosecutions by the Internal Revenue Service. Incident to the latter, the government agreed not to require him and Long to reveal where they deposited any funds or the amounts except where deposited in foreign banking institutions (A. 89-92, 164-67, 183).

At the time of this case, Fox was also under indictment for murder in Georgia. His deal further provided that the government would ask no questions relating to that charge (A. 105).

This "plea bargain," as appealing as it may seem, obviously did not satisfy Fox and Long. For just three or four days prior to testifying they entered into another deal with the government (A. 93). Now it was agreed that he and Long were to be sentenced to a 3-year term under 18 U.S.C. §4208(a)(2) (A. 93, 171). They were told that

the Parole Board was in the hands of the Department of Justice and that the Board normally goes along with their recommendations (A. 91, 93). Under the new agreement, parole would be recommended after 14 months (A. 117, 173). The other aspects of the old agreement were carried forward in this new one, including the income tax provision for Internal Union Services which never filed an income tax return. Fox was concerned with this provision as he knew he owed the government money (A. 94-96).

(7) **Jay Long**: He and Fox negotiated their "plea bargains" together and so the same deal as sketched above applies to him.

Tifford and Kirschner asked him to appear before a Senate or House Committee investigating such frauds, explaining that they expected to be transferred to Washington for some special assignments depending upon their success in the Transcontinental case (A. 163-69). Long, of course, was well aware that the prosecutors wanted great success in this case for their own personal future and was anxious to satisfy (A. 167).

In July 1972, Long also received permission to leave the country for the entire month. One trip took him to Nassau; another to England, Greece and Switzerland (A. 169-70).

Once again, he was granted immunity for income tax evasion although he admitted to owing the government money, but under the terms of his agreement he never has to disclose the whereabouts of his assets (A. 168-9).

It is difficult to imagine from a review of these agreements a situation where plea bargaining was more improperly administered and where the due process requirement of fundamental fairness was more blatantly violated. But aside from the agreements themselves, other events occurred between the prosecution and the co-conspirators which further point to the suspicious nature of the agreements and the incredibility of the testimony which was, in effect, bought by the prosecution.

One of these events was a boat trip sometime in May 1972, in which Tifford and Kirschner spent a week end with several of the defendants (A. 85-89, 160, 238-39).

According to the testimony adduced at the trial, Kirschner and Tifford were trying out one of the boats that they were considering buying together. The sale and financing were to be arranged by Michael Strauss, a co-conspirator, who had earlier pled guilty (A. 88).

The petitioner cannot conclude from such activity any one act of impropriety that might have occurred during the boat trip except to point out the *prima facie* impropriety of such a trip even taking place at a time when plea bargains were being negotiated and a case was being prepared for trial.

Additionally, several of the co-conspirators testified to their many meetings together with Tifford and Kirschner where they would review facts and particular situations about the case. They would refresh each other's recollection as to facts they would later testify to at the trial (A. 77-79, 230-31).

Thus, we have a background picture of how the two U.S. attorneys were so desirous of a successful result at trial that they wooed and courted the petitioner's co-defendants and co-conspirators to the extreme of taking a week-end boat trip with them, to arranging meetings whereby testimony was reviewed, corrected and collated, and to threatening, promising and collaborating on plea bargains that go far beyond merely questioning the credibility of the witnesses. For the net result was a parade of prosecution-bought witnesses whose testimony no doubt influenced the jury in its determination and whose testimony was so tainted by this background of inequity that the petitioner's guarantee to a fair trial was virtually negated.

The government in the Court of Appeals argued that although deals were made with these witnesses, a total of 45 witnesses appeared and testified against the petitioner. But this begs the issue. By far the most harmful and effective testimony came from those accomplices who traded testimony for deals. These men were witnesses with intimate knowledge of the Transcontinental fraud. Indeed, they were prime movers and accomplices. A jury may disregard the testimony of one on the basis of his self-interest, but six? To what extent did their testimonies, taken together, move the jury to convict the petitioner?

It is plain that the petitioner was effectively denied a fair and impartial trial through the tactics of the prosecution. The collaboration of the co-conspirators, at the behest of the government, rendered their testimony incompetent since evidence through personal knowledge could not be differentiated from matters made known by other co-con-

spirators. The probative value of their testimony should have been nil. The plea bargains and special arrangements, predicated upon the effectiveness of the evidence obtained or offered by the co-conspirators, can only be categorized as shocking and an example of gross impropriety on the part of the prosecution.

Most important of all is the predictable effect that such collaboration, plea bargains, and even boat trips had upon the petitioner. It virtually guaranteed the petitioner's conviction in a manner that deprived him of due process of law.

This Court, having "legitimatized" plea bargaining, can now define its metes and bounds. The Court can now decide that where the plea bargaining process results in massive testimony propelled by self-interests, that process is so abused that it ceases to serve its proper and intended function and becomes an instrument of power in derogation of fundamental rights.

II

The prosecutor's use at trial of the incriminating statements attributable to the petitioner deprived the petitioner of his right to counsel under the Sixth Amendment.

In *Massiah* v. *United States*, 377 U.S. 201 (1963), this Court held that self-incriminating statements taken in absence of counsel, were violations of the defendant's right to counsel under the Sixth Amendment, and thus inadmissible at trial. Such statements are inadmissible whether they are taken by the police or by an informant working as an

agent of the police, regardless of the voluntariness of the statement. *United States ex rel. Milani* v. *Pate,* 425 F.2d 6, 7 (7th Cir. 1970), *cert. den'd* 400 U.S. 867 (1970).

Incident to their plea bargain arrangement, the prosecution employed Edwin Fox to "negotiate" with the petitioner (A. 72). At Tifford's request, Fox called Miele two or three times and asked Miele if he would be interested in making a deal (A. 72). The upshot of the conversation was that Miele told him he would not plead guilty (A. 72-3).

On redirect examination the prosecution inquired further into the details of the telephone conversation between Fox and Miele.

It was then, at the prodding of the prosecutor's questioning, that Fox related that Miele told him he would be agreeable to a deal but only if it involved a suspended sentence (A. 118-20).

Over petitioner's motion for a mistrial this testimony, tantamount to an admission of guilt, was admitted, its damaging and prejudicial effect on the petitioner obvious.

In fact the prosecution compounded the prejudice already suffered by the petitioner by commenting upon these statements in its summation (A. 244).

Thus, the introduction into evidence of the incriminating statements attributable to the petitioner, made to what at that time was an agent of the government, without his counsel present, at a time when he was represented by

counsel, clearly violated petitioner's rights under the Sixth Amendment as put forth in *Massiah* v. *United States, supra.*

Conclusion

For the reasons set forth herein, the writ of certiorari should be granted.

Respectfully submitted,

/s/ O. JOHN ROGGE

O. JOHN ROGGE
Attorney for Petitioner

Of Counsel:
O. JOHN ROGGE
RICHARD HARRIS ROSENBERG

Appendix 1

Judgment of the United States District Court for the Southern District of Florida

United States District Court

FOR THE

SOUTHERN DISTRICT OF FLORIDA

FILED

OCT 26 1972

JOSEPH L. BOGART
CLERK U. S. DIST. CT.
SOUTHERN DIST. OF FLA.
MIAMI, FLA.

United States of America

v.

CHARLES A. MIELE

No. 72-310-CR-JE

On this 26th day of October, 19 72 came the attorney for the government and the defendant appeared in person and[1] by Counsel, E. David Rosen, Esq.

It Is ADJUDGED that the defendant upon his plea of[2] Not Guilty and a Jury Verdict of GUILTY has been convicted of the offense of conspiracy to violate sections 1341, 1342, 1343, 2314 and violation of Sections 1341, 1342, 1343, 2314, 371 & 2, of Title 18, United States Code,

as charged[3] in Counts 2,3,4,5,6,7,8,9,10,14,16, 17,18,19,20,22,27,28 of the Indictment

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is ADJUDGED that the defendant is guilty as charged and convicted.

It Is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] THREE YEARS as to each of Counts 2,3,4,5,6,7,8,9,10, said periods of confinement as to each of counts 3,4,5,6,7,8,9,10, as to run concurrently with each other; THREE (3) YEARS as to each of Counts 14, 16, 17, 18, 19, 20, 22, 27, 28, said periods of confinement as to each of counts 16, 17, 18, 19, 20, 22, 27, 28 are to run concurrently with each other and consecutive to the sentence of confinement imposed as to counts 2,3,4,5,6,7,8,9,10, or until otherwise discharged by due process of law.

It Is ADJUDGED that[5] Counts 16, 17, 18, 19, 20, 22, 27, 28 are also to run concurrently with count 14.

Certified to be a true and
correct copy of the original.
Joseph L. Bogart, Clerk
U. S. District Court
Southern District of Fla.

By _____
Deputy Clerk

Date _____

It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

S/ Joe Eaton

United States District Judge.

The Court recommends commitment to[6]

Clerk.

[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel. [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number _____ " if required. [4]State (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, where each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

Appendix 2

Judgment of the United States Court of Appeals for the Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3503

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES A. MIELE,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(April 26, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1579

CHARLES A. MIELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of committing mail fraud, in violation of 18 U.S.C. 1341 and 1342, of aiding and abetting the commission of mail fraud by others, in violation of 18 U.S.C. 2, and of conspiring to commit mail fraud, in violation of 18 U.S.C. 371. He was sentenced to three years' imprisonment (to be served concurrently) on each of nine separate counts, and three years' imprisonment (to be served concurrently with each other but consecutively to the first sentence) on each of nine remaining counts. The court of appeals affirmed without opinion (Pet. App. 2).

Petitioner, together with several co-conspirators, was a principal in a scheme to defraud potential commercial borrowers. Petitioner contends that he was denied a fair trial because of plea bargaining between the prosecution and petitioner's co-conspirators, and further urges prejudice in the admission of an accomplice's testimony, first referred to by defense counsel, concerning a telephone conversation in which he urged petitioner to plead guilty.

1. While not contending that plea bargaining is itself unlawful (see *Santobello* v. *New York*, 404 U.S. 257, 260-261), petitioner challenges the plea bargaining agreements negotiated prior to trial between the prosecution and six co-conspirators, as "virtually guarantee[ing] a prosecution-stacked deck against one man" and thereby denying him the right to a fair trial (Pet. 8).

The courts have long recognized that accomplices who offer to testify in the hope of receiving reduced sentences or lenient treatment are not disqualified from appearing as witnesses against the remaining defendants, provided the circumstances surrounding their testimony are made known to the jury. *Caminetti* v. *United States*, 242 U.S. 470, 495; *United States* v. *Stanley*, 433 F. 2d 637 (C.A. 5); *Williamson* v. *United States*, 365 F. 2d 12, 14 (C.A. 5). Judgments as to such witnesses' credibility are for the jury alone. *Pierce* v. *United States*, 252 U.S. 239, 251-252; *Williamson* v. *United States, supra; Doherty* v. *United States*, 230 F. 2d 605 (C.A. 9).

In the instant case great care was taken to safeguard petitioner's right to a fair trial by assuring the defense a full opportunity, in the presence of the jury,

to explore the accomplices' motives in testifying. Defense counsel was furnished in advance of the co-conspirators' testimony copies of the plea bargaining agreement and transcripts of all proceedings wherein they entered pleas of guilty (R. 305-344, 668-690, 808-812, 941-958, 1087-1097, 1301-1311, 1375-1389).[1] The trial judge properly admonished the jury to examine the accomplice testimony with great care (SSR. 324-326).

2. Petitioner challenges the admission, on redirect examination, of testimony by co-conspirator Fox as to the substance of a telephone conversation between Fox and petitioner approximately two months before the trial (R. 311-312). On cross-examination of Fox, the defense brought out that Fox had telephoned petitioner at the request of one of the prosecuting attorneys and had urged him to plead guilty. Redirect examination by government counsel developed that petitioner had told Fox he would not be interested in any kind of plea bargaining unless it involved a suspended sentence (R. 357-359). Petitioner's motion for a mistrial based upon this testimony was denied (R. 359-361).

Since the subject of the telephone conversation was first brought out by the defense on cross-examination, the government was entitled to develop the issue fully once it had been injected into the case. Where a witness has been cross-examined as to part of a transaction, then the whole transaction, to the extent it relates to the same subject matter, may be elicited

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[1] "R." denotes the record on appeal, "SR" the supplemental record on appeal, and "SSR" the second supplemental record on appeal.

on redirect examination. *United States* v. *Walker,* 421 F. 2d 1298 (C.A. 3); *Harrison* v. *United States,* 387 F. 2d 614 (C.A. 5). Thus the testimony was properly admitted.

Petitioner's reliance on the exclusionary rule of *Massiah* v. *United States,* 377 U.S. 201, is misplaced. In *Massiah* the prosecution introduced, as direct evidence, incriminating statements deliberately elicted by government agents in the absence of Massiah's counsel. Here, the substance of petitioner's conversation with Fox was introduced by the defense, apparently to test Fox's credibility. The prosecuting attorney did no more than elicit the balance of the subject matter into which the defense had already inquired.

In any event, if the admission of this testimony constituted error, it was "harmless beyond a reasonable doubt" (*Chapman* v. *California,* 386 U.S. 17, 24) when weighed against the overwhelming proof of petitioner's guilt from other evidence.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1973.